Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

Nos. 92-848, 92-879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

BELLSOUTH CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AT&T'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the D.C. Circuit correctly held that AT&T has rights to enforce certain provisions of the 1982 AT&T Antitrust Consent Decree and that these provisions cannot be modified, over AT&T's objection, unless the seven divested Bell Companies satisfy the agreed-upon modification standard set forth in Section VIII(C) of this Decree.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the following companies that have publicly-traded securities: Compagnie Industriali Riunite S.P.A., AT&T Capital Corporation, and AT&T Credit Corporation.

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BELLSOUTH CORPORATION

v.

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AT&T'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

These petitions present a narrow issue involving the interpretation of the 1982 Antitrust Consent Decree that broke up the former Bell System ("Decree").[1] The D.C. Circuit held that this Decree gives the post-divestiture AT&T a right to enforce certain provisions of the Decree in accordance with its terms and original purposes and that these provisions thus cannot be modified, over AT&T's objection, unless the divested Regional Bell Operating Companies ("RBOCs") have satisfied the modification standard set forth in Section VIII(C) of the Decree. The

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[1] *See United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982) ("*Decree Opinion*"), *aff'd mem. sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). The petition of Ameritech *et al.* (No. 92-848) will be cited as "Pet." and the petition of BellSouth (No. 92-879) will be cited as "BellSouth Pet."

D.C. Circuit held that this interpretation was required by the unambiguous terms of this Decree, by the circumstances surrounding its adoption, and by the prior interpretations, positions, and practices of the Justice Department, the RBOCs, and the courts alike during the first eight years after the Decree's entry.

This decision is an application of settled principles of consent decree construction to a set of unique facts. The D.C. Circuit decision does not conflict with the decision of any other court. Indeed, the only way petitioners can challenge the D.C. Circuit's decision is by ignoring controlling principles and by asserting a series of factual claims that the lower courts correctly rejected and that are otherwise inappropriate for review by this Court. Beyond that, intervening events establish that the disputed issue has no practical importance for the administration of this, or any other, decree.

1. The AT&T Decree. The AT&T Antitrust Decree was entered in 1982 to put an end to three decades of incessant antitrust litigation between the former Bell System and the United States (and more than 70 private plaintiffs). In that litigation, the United States (and the private plaintiffs) claimed that the Bell System's combination of regulated local exchange "bottleneck" monopolies and potentially competitive long distance ("interexchange") and manufacturing businesses was inherently anticompetitive. This integration meant that the Bell System had the ability and incentive to use its local exchange monopolies to impede competition in these related businesses—by discriminating in providing access to essential facilities, engaging in predatory pricing and cross-subsidization, and otherwise.

In that litigation, AT&T (as the then-parent of the Bell System) vigorously opposed these claims. AT&T defended the challenged conduct of the local Bell monopolies. AT&T further claimed that the Bell System was more efficient than any alternative and that it would

lead to increased costs and inefficiencies if the Bell System were split between its local exchange monopolies and its long distance and manufacturing businesses. Common Channel Signalling was identified as one of many areas in which increased costs and lost efficiencies would result. *See, e.g.*, D-T-1, pp. 44-48 (C.A. J.A. 65-69).

However, it became painfully apparent that this integration of monopoly and competitive businesses would continue to be a source of incessant controversies and crippling uncertainty, regardless of how the pending cases were resolved. Accordingly, on January 8, 1982, AT&T and the United States agreed to a Decree that was designed to put an end to these antitrust controversies in the only way possible: by prohibiting any affiliation between the local Bell telephone monopolies and the related competitive businesses in which those local monopolies can be used to impede competition.

The Decree has two principal sets of interrelated provisions which are, as the Justice Department said in 1982, "opposite sides of [a single] coin." Tr. 25179 (C.A. J.A. 179b). First, Section I(A) of the Decree split the integrated Bell System between its bottleneck local monopolies and its potentially competitive long distance and manufacturing businesses by ordering AT&T to divest the local exchange monopolies to the seven RBOCs. To implement this division, Sections II(A) and (B) of the Decree require the RBOCs to deliver traffic to AT&T at specified points within each of the RBOCs' "exchanges" or "LATAs" and require the RBOCs to extend the same rights to AT&T's competitors.

Second, other provisions prohibit the eight post-divestiture entities from recreating the combinations that divestiture ended. Section I(D) of the Decree prohibits the post-divestiture AT&T from reacquiring any divested assets. Correlatively, Section II(D) and Section VIII(C) prohibit the divested RBOCs from providing long distance services, manufacturing equipment, and engaging in

other competitive businesses until such time as an RBOC can show that it cannot use monopoly power to impede competition in a market it seeks to enter.

The Decree was entered following extensive Tunney Act proceedings in which the Bell System and Justice Department each stated that their mutual purpose in agreeing to the Decree was to end "the structural problems that had given rise to the antitrust controversies between the United States and AT&T over the last three decades" [2] and thereby to prevent any "recurrence of the type of discrimination and cross-subsidization that were the basis of the AT&T lawsuit." *Decree Opinion*, 552 F. Supp. at 147. In this regard, whereas AT&T stated that neither divestiture nor the line of business restrictions were "[its] idea" (*see* Pet. 21 n.19), AT&T made it explicit that it had agreed to the Decree to end any potential for abuses and controversies, and AT&T explicitly *opposed* the proposals to eliminate the line of business restrictions on the divested RBOCs.[3]

The District Court approved the Decree's interexchange, manufacturing, and other line of business restrictions on the ground that there was a strong likelihood the divested RBOCs otherwise would use their local

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[2] Department of Justice's Competitive Impact Statement, p. 8 (Feb. 10, 1982) (C.A. J.A. 105); *accord id.*, pp. 25-26 (C.A. J.A. 112); May 21, 1982 AT&T Reply to Public Comments, pp. 1-2, 40-46, 135-37 (C.A. J.A. 131, 137-42, 148).

[3] *See, e.g.*, May 21, 1982 AT&T Reply, pp. 104, 105 & nn.** (opposing removal or automatic sunset on ground that line of business restrictions will be required so long as the RBOCs retain regulated exchange monopolies that can be leveraged into the particular competitive market) (C.A. J.A. 146); June 14, 1982 AT&T Reply, pp. 16-17 (refuting contentions that the divested RBOCs would not be "financially viable" unless the line of business restrictions were removed) (C.A. J.A. 159-60); Tr. 25211 (the line of business restrictions are required by the Decree's antitrust theory and AT&T "stand[s] by it") (C.A. Supp. J.A. 13).

exchange monopolies to impede competition in these competitive markets. *Decree Opinion*, 552 F. Supp. at 185-95.

At the same time, the District Court recognized that developments "over time" might cause the RBOCs to "lose the ability to leverage their monopoly power" into these competitive markets and that "the need for the restrictions" would then disappear. *Id.* at 194-95 & n.266. To assure that the restrictions would be removed before they became anticompetitive and "[t]o avoid any [future] question about the appropriate test," the court required that the Decree explicitly adopt the same "standard for removal of the restrictions" that had been applied in imposing the line of business restrictions (and in ordering AT&T's divestiture of *each* of the RBOCs). *Id.* This standard is set forth in Section VIII(C):

> The [line of business] restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

The Decree thus rests on explicit findings that it is in the public interest to prohibit each of the seven divested RBOCs from participating in interexchange, manufacturing, and other markets as long as they have local exchange monopolies that can be used to impede competition.

In this regard, while the Justice Department has recently sought to repudiate this antitrust determination and has supported legislation to overrule it in part, these provisions of the Decree have been defended in Congress by a broad spectrum of the Nation's antitrust experts: Robert Bork, Phillip Areeda, and Lawrence Sullivan.[4]

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[4] *See* Written Statements of Robert Bork, Phillip Areeda, and Lawrence Sullivan, *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part II), Hearings Before the Subcomm. on Economic and Commercial Law of the House*

2. Proceedings Between 1982 and 1990. In the years since the Decree's entry, there have been many disputes involving the Decree's line-of-business and other restrictions on the divested RBOCs. Until the events that gave rise to this appeal, all the parties to the Decree recognized that the post-divestiture AT&T has a right under Sections III, VII, and VIII(C) of the Decree to maintain and enforce the restrictions on the RBOCs in accordance with the terms and original purposes of the Decree. Between 1983 and 1990, AT&T repeatedly exercised its right under Section VII of the Decree to file motions to enforce the Decree's restrictions on the RBOCs—motions which were often opposed by the Justice Department—and AT&T opposed numerous proposed modifications that the RBOCs and Justice supported.[5]

During this period, no one disputed AT&T's legal and equitable interest in maintaining and enforcing the restrictions. To the contrary, the Justice Department defended its own failure to enforce the Decree's restrictions on the RBOCs by relying on AT&T's "right to seek enforcement" of these restrictions "at any time." Pet. 18a. Similarly, the Justice Department and the RBOCs did not dispute that the Section VIII(C) standard governed RBOC modification requests opposed by AT&T,[6] and the

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Comm. on the Judiciary, 102d Cong., 2d Sess. (Feb. 19, 1992) (attachment to testimony of Robert E. Allen).

[5] *See, e.g.*, Feb. 17, 1984 AT&T Motion (C.A. J.A. 230-67); Oct. 17, 1984 AT&T Motion (C.A. J.A. 280-333); Nov. 6, 1986 AT&T Emergency Motion (C.A. J.A. 334-358); July 17, 1987 AT&T Emergency Motion (C.A. J.A. 416-28); March 16, 1990 AT&T Motion (C.A. J.A. 699-700) (motion seeking to impose additional obligations on the RBOCs pursuant to Section VIII(I)); March 13, 1987 AT&T Comments (C.A. J.A. 364-75) (opposing DOJ proposal to eliminate line of business restrictions); Nov. 16, 1988 AT&T Opposition (C.A. J.A. 429-43).

[6] *See, e.g., Triennial Review Appeal*, D.C. Cir. Nos. 87-5388 *et al.*, DOJ Br., p. 17 (April 1989) (Section VIII(C)'s "language, together with any evidence of contemporaneous understanding of its

D.C. Circuit twice so ruled. *Triennial Review Opinion*, 900 F.2d 283, 292, 294-95, 301-05 (D.C. Cir. 1990); *NYNEX Procurement Opinion*, 907 F.2d 1205, 1207-08 & n.3 (D.C. Cir. 1990).

3. The Instant Dispute and the Decisions Below. The instant dispute arises from a modification that was proposed by U S West and then joined by the other six RBOCs. The proposed modification would have excused the RBOCs from their Section II(A) and (B) obligations to deliver signalling to AT&T (and others) at "signalling transfer points" ("STPs") in each of the RBOCs' LATAs and would have allowed the RBOCs to provide the interexchange service of carrying the signalling information across LATA boundaries.

In their motions, the RBOCs sought a blanket, unconditional modification that would allow them to transport signalling information to a single centralized point. The RBOCs claimed that the costs of putting STPs in each LATA were prohibitive for them and for smaller interexchange carriers. At the same time, the RBOCs *refused* AT&T's invitation that they seek a waiver that was tailored to the genuine problems that the RBOCs (and smaller interexchange carriers) faced in establishing signalling transfer points and using CCS signalling in certain rural and less-populated LATAs.

Contrary to the RBOCs' misstatement (BellSouth Pet. 9), the overwhelming majority of both small and large interexchange carriers opposed the blanket modification that

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meaning, establishes the standard for modification of the line of business restrictions"); *id.*, RBOC Section VIII(C) Br., p. 57 & *passim* (Apr. 17, 1989) *and* RBOC Information Services Br., pp. 17-21 (Apr. 17, 1989) (arguing "legally correct section VIII(C) standard" applied to RBOC motions that were opposed only by AT&T, even where DOJ had supported RBOCs' motion to remove certain restrictions, and that the "public interest" test applied to motions that no Decree party had opposed).

the RBOCs sought,[7] and no interexchange carrier supported the RBOC's appeal. Similarly, although the Justice Department supported the RBOCs' motion, it performed a "perfunctory" analysis that rested on the curious ground that the waiver opponents had not shown that competitive "benefits" justified the costs the RBOCs alleged. Pet. 25a-26a.

On July 13, 1990, the District Court denied the RBOCs' proposed modification on the ground that the RBOCs had not made the showing required by Section VIII(C). Pet. 44a-53a. In an August 1990 reply brief on reconsideration, the RBOCs then argued, for the first time in eight years of Decree litigation, that Section VIII(C) does not apply to RBOC modification requests supported by the Justice Department and that such a modification must be granted so long as it is found to be within the broad reaches of the public interest.[8] The Justice Department did not support this argument in the District Court, and the court held that there was not "the slightest support" for it. Pet. 55a n.1.

D.C. Circuit Decision. On appeal, the Justice Department for the first time supported the RBOCs' argument

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[7] *See, e.g.*, May 11, 1989 MidAmerican Long Distance Co. Response, pp. 5-6 (C.A. J.A. 660-61); Apr. 17, 1989 ALC Communications Corp. Response, pp. 11-15 (C.A. J.A. 561-65); Apr. 17, 1989 CompTel Response, pp. 7-8 (C.A. J.A. 558-59); Mar. 24, 1989 US Sprint Response, pp. 1, 4-5 (C.A. J.A. 533-35); Mar. 22, 1989 MCI Opposition (C.A. J.A. 502-523); Mar. 15, 1989 AT&T Response (C.A. J.A. 491-501).

[8] The RBOCs rested this latter argument on the D.C. Circuit's intervening *Triennial Review Opinion*, 900 F.2d 283 (D.C. Cir. 1990). Ironically, that opinion had stated that the Section VIII(C) standard applied to RBOC motions that were opposed only by AT&T —which was the procedural posture of the CCS motion. However, the RBOCs relied on a footnote in the Opinion that purportedly suggested that a different standard might apply if DOJ filed the motion (as DOJ did neither there nor here). *See id.* at 294 n.12.

that Section VIII(C) is inapplicable to RBOC motions that the Department supports. However, the D.C. Circuit rejected this argument and affirmed.

First, the D.C. Circuit held that modification requests cannot be granted, over AT&T's objection, unless the Section VIII(C) standard is satisfied. The court held that the Decree's language is "not ambiguous" and establishes AT&T's "legal and equitable" interest in maintaining the restrictions in accordance with their terms and original purposes. *See* Pet. 16a, 22a. The court reasoned that "Section III treats AT&T as a formal party to the *entire* decree, with specific authority under Section VII to demand enforcement of *any* section of the agreement" and that the language of Section VIII(C) is fully applicable to requests opposed by any such party to the entire Decree. Pet. 18a (emphasis in original).

The court also noted that the unambiguous meaning of the Decree's text was supported by (1) the stated premises of the Decree from the contemporaneous Tunney Act proceeding (Pet. 16a-17a), (2) the fact that the RBOCs' interpretation would "infringe[]" and "devalue[]" other AT&T rights and obligations under Sections I(A) and II(A) and (B) and Appendix B of the Decree (Pet. 20a n.15),[9] and (3) the interpretations, positions, and practices of the Department, the RBOCs, and the courts during the first eight years after the Decree's entry (Pet. 22a-24a).

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[9] In particular, the D.C. Circuit stated that although it did "not think [that] a particular examination of AT&T's rights and interests is called for under the decree in order to conclude that AT&T has every right to force a section VIII(C) examination of the CCS proposal," nonetheless "it appears that AT&T would qualify" under such a standard. Pet. 20a n.15. The CCS waiver, if granted, would reduce the value of assets allocated to AT&T under the plan of reorganization implementing the Decree, for at divestiture "the Bell System's widespread signaling facilities [including CCS facilities] were allocated to AT&T." *Id.* AT&T therefore had "a cognizable and unique interest (vis-a-vis other interexchange carriers) in the CCS waiver." *Id.*

In this regard, the Court of Appeals rejected the RBOCs' arguments that the plain meaning of the Decree could have been altered by the 1982 statements of Bell System representatives (who now work for AT&T) that the restrictions (and divestiture) were a bad idea, but had been agreed to in order to avoid greater evils. Quite apart from the fact that there were other such statements "demonstrating more affirmative interest in the prohibitions" (Pet. 19a), the court noted that the statements were made on behalf of the unified Bell System, that they simply reflected the Bell System's longstanding positions, and that, in all events, the statements did not relate to the rights that the *post*-divestiture AT&T would possess under Sections III, VII, and VIII(C). Pet. 19a-20a.

Finally, the D.C. Circuit rejected the dissent's and the Justice Department's suggestion that AT&T should lack " 'antitrust standing' " on the theory that AT&T would be somehow preventing legitimate competition by the RBOCs. Pet. 21a (quoting Pet. 39a). The majority noted that "the flaw in our colleague's reasoning . . . is that he entirely ignores the potential anticompetitive leverage that the BOCs' monopoly position in the bottleneck local markets affords their entry into the interexchange markets. Pet. 21a-22a. The D.C. Circuit further noted that "Section VIII(C) does not give AT&T the power to veto truly procompetitive line-of-business modifications." Pet. 22a. In any event, the D.C. Circuit held that Judge Williams's and the Department's suggestions were pertinent, at most, to how a different decree might have been drafted:

> [T]he question before us is not how we would fashion the decree if we were writing on a clean slate. The decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C).

Pet. 22a.

Second, after reaffirming the applicability of Section VIII(C), the D.C. Circuit upheld the District Court's conclusion that the proposed blanket waiver of the interexchange restriction had not satisfied this standard. The court stated that a blanket waiver would impede competition by "tak[ing] a piece of the interexchange market completely out of competition." Pet. 27a. The D.C. Circuit also expressed skepticism about the cost savings that the RBOCs claimed. Pet. 28a-29a & n.20. In particular, although the RBOCs claimed it would be prohibitively expensive to install STPs "in *some* LATAs," the D.C. Circuit noted that "their position is undercut by their insistence on a blanket, nationwide waiver rather than transitional waivers for only those particular LATAs—waivers that AT&T has stated it would not oppose and that we too would be likely to view sympathetically." Pet. 28a.[10]

4. Subsequent Developments. Within days of the court of appeals' decision, U S West, the lead RBOC in this proceeding, filed a new waiver request. Whereas U S West had previously stated that it was infeasible and prohibitively expensive to install STPs in more than 6 of its 26 LATAs, U S West revealed that it had already installed STPs in 23 of its 26 LATAs in the interim period and would install STPs in the remaining LATAs by December 31, 1996.[11] Accordingly, U S West now sought

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[10] *This* is the ground on which GTE obtained a modification of its separate decree. *See* Pet. 57a-61a. Contrary to the RBOCs' misstatement (Pet. 15-16), in granting this waiver the District Court did not rely on differences in the legal standard. Instead it relied on the fact that GTE is different from any individual RBOC because virtually all GTE's 101 LATAs are rural. *See* Pet. 60a (noting this "fundamental, substantive difference between the two situations"); *see also United States* v. *GTE Corp.*, 603 F. Supp. 730, 733-36 (D.D.C. 1984).

[11] *See* Aug. 12, 1992 Letter from Jeffrey S. Bork, U S West, to Richard L. Rosen, DOJ (submitting motion); Oct. 15, 1992 U S West Motion.

only a modest transitional waiver allowing it to delay installations in its three most rural LATAs until that date. This was the type of waiver that AT&T had stated for years that it would not oppose, and the District Court promptly granted it. *See Order* (D.D.C. Nov. 10, 1992). The other RBOCs have not had to seek even transitional waivers.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's decision does not present any question that warrants review by this Court. The decision applies settled principles of consent decree interpretation to particular provisions of one antitrust consent decree. The decision does not conflict with any decision of this Court or of any other court, and given the D.C. Circuit's exclusive role in interpreting the Decree, there is no possibility of conflicting interpretations of it. Nor does the decision have importance for other existing, or future, decrees. As the United States stated below, "this case presents an unusual situation . . . [w]e are not aware of any other case in which a similar situation has arisen." DOJ C.A. Br. 23.

In these circumstances, the only way petitioners can argue for review is by advancing a series of contrived claims that ignore settled law, that misstate the D.C. Circuit's decision, and that, in one instance, was not even raised below. Petitioners' claims ultimately reduce to attempts to relitigate factual claims that were properly rejected below and that are otherwise inappropriate for review by this Court. That is especially so because intervening events establish that the underlying dispute has little practical significance.

I. THE D.C. CIRCUIT'S DECISION IS A CORRECT APPLICATION OF SETTLED PRINCIPLES OF CONSENT DECREE INTERPRETATION AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

The principles that govern the construction of consent judgments are well settled. A consent decree "is to be construed basically as a contract." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).[12] A court is to examine the "four corners" of the instrument and such "aids to construction" as the "circumstances surrounding the formation of the consent order" (420 U.S. at 238) and the prior positions and course of dealings among the parties. *See, e.g., United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959); *Restatement of Contracts* 2d § 223(1); 4 *Williston On Contracts*, § 623 (1961).

1. The D.C. Circuit applied these principles in holding that the 1982 AT&T Consent Decree gives AT&T a right to maintain and enforce the Decree's line of business restrictions on the RBOCs in accordance with the Decree's terms. Contrary to the RBOCs' misstatement, the court focused on the "peculiarities of this particular decree" (*compare* Pet. 11, 16), and the D.C. Circuit's holding establishes that AT&T *is* an "intended beneficiary" of the Decree provisions at issue (*compare* Pet. 21).

The D.C. Circuit relied, first and foremost, on the unambiguous terms of the Decree. It noted that Section III expressly makes AT&T a party to all the provisions of the Decree, including the restrictions on the RBOCs, and that Section VII of the Decree gives AT&T explicit

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[12] *Accord United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *see also Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948).

rights to apply to the District Court "at any time" for enforcement or compliance with the Decree's line of business restrictions in accordance with their terms. Finally, the court noted the language of Section VIII(C) is fully applicable to modifications opposed by AT&T.

Second, the "circumstances surrounding the formation of the Decree" supported the obvious import of the Decree's plain terms. The D.C. Circuit noted what both original parties had made explicit in the 1982 Tunney Act proceedings: AT&T's divestiture of the RBOCs and the restrictions on the divested monopolies rested on the same ground. AT&T and the United States had agreed to each of these provisions "on the premise" that the RBOCs otherwise would likely "leverage that bottleneck control in the interexchange (long distance) market." Pet. 16a. Because "the local monopolies were taken away from AT&T" "*for that reason*," the court stated that to conclude that AT&T has no right to prevent an RBOC's " 'return' to the interexchange market, there to compete against AT&T with the same sort of local monopoly leverage that caused the government to bring suit against AT&T in the first place, has an ironic, even Kafkaesque quality." Pet. 16a-17a (emphasis in original).

Contrary to petitioners' persistent misstatements (*e.g.*, Pet. i), the D.C. Circuit also recognized that the proposed modification of the line of business restrictions would directly "infringe" AT&T's other "rights narrowly expressed" under Sections I(A) and II(A) and (B) of the Decree. Pet. 20a n.15. In particular, the court recognized that the value of these assets that the Decree required AT&T to accept would be adversely affected under the proposed blanket waiver and that AT&T's separate Decree obligations were premised on the maintenance of the restrictions on the RBOCs in accordance with the Decree's terms and purposes. *See* p. 9 & n.9, *supra*.

Finally, the D.C. Circuit relied on the prior positions of the Justice Department, the RBOCs, and the courts

during the first eight years following the Decree's entry. As the D.C. Circuit held, the Justice Department previously had expressly recognized AT&T's rights to maintain and enforce the restrictions on the RBOCs; the Department and the RBOCs had assumed those rights in prior appeals; and the D.C. Circuit had twice concluded, without objection, that Section VIII(C) applies to modification requests that are supported by the RBOCs and Justice, but opposed by AT&T. *See* Pet. 16a, 22a-24a.

Indeed, these latter factors would be dispositive under this Court's decisions, even if the AT&T Decree's terms were not unambiguous. As this Court has held, the meaning of such a decree is fixed by the prior interpretations of those "government officials who drew up and administered the Decree from the start" and a decree's meaning cannot be changed when, as here, new personnel attempt to "renounce[]" prior interpretations. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959). These principles have special force in this case because the Decree is not ambiguous and because it is not just the Justice Department, but *all* other parties to the Decree and the court itself that consistently adopted the same position.

Petitioners have no response to these points. Indeed, the only way the RBOCs can advance their contrary claims is by ignoring the principle that consent decrees are to be construed as contracts. Their principal claim appears to be that there should be a "common law" rule against the provisions at issue because otherwise an "alleged antitrust violator" may "block" procompetitive modifications that are required by the "public interest." *E.g.*, Pet. 11, 12-16, 19-23.

This contention is not only inconsistent with the contractual nature of consent decrees, but it is factually wrong, for two reasons. First, the RBOCs ignore the fact that the line of business restrictions were imposed on the RBOCs because *they* inherited the local Bell bottleneck monopolies that can be used to impede interexchange

competition in violation of the antitrust laws. That is why the RBOCs are prohibited from providing long-distance services (*e.g.*, to cellular radio customers, *see* Pet. 14 & n.10), and why the post-divestiture AT&T is not. Second, as the D.C. Circuit held, Section VIII(C) was added to the Decree to assure that the line of business restrictions would be modified if and when the antitrust laws required, and, as a result, Section VIII(C) *denies* "AT&T the power to veto truly procompetitive line-of-business modifications." Pet. 22a.[13]

In short, the decision below correctly gives effect to the unique provisions of the AT&T Decree that have been found to promote the antitrust laws and to be in the public interest.

2. For these same reasons, the D.C. Circuit's decision does not conflict with the decision of any other court. Indeed, the most the RBOCs can claim (Pet. 23) is that the decision "conflicts in principle" with "numerous decisions"—all of which, of course, arose under different decrees containing different language. It is not clear what the RBOCs mean by a "conflict in principle." However, there would not be a conflict of any type here even if all the other decrees at issue were identical to the 1982 AT&T Decree.

The four district court decisions cited by petitioners (Pet. 24 n.25) stand only for the unexceptional principle that the "public interest" standard applies when no

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[13] Similarly, the RBOCs continue to seek to qualify the post-divestiture AT&T's explicit rights by invoking the earlier statements of Bell System representatives that the restrictions were a bad idea, but that the Bell System agreed to them and to divestiture to avoid greater evils. Quite apart from the fact that these statemens are meaningless in themselves and were contradicted by other contemporaneous Bell System statements from that year (*see* Pet. 19a; p. 4 n.3 & p. 10, *supra*), these statements did not address the rights of the *post-divestiture* AT&T and are irrelevant to the construction of Sections III, VII, and VIII(C). The D.C. Circuit rejected this claim for this reason. Pet. 19a-20a.

party challenges a requested modification. That is the rule under the AT&T Consent Decree as well.[14]

Similarly, petitioners have not cited a single case that even indirectly supports their claim that the "public interest" standard can apply when a party to a decree objects to a modification that is sought or supported by the government and that would deny the objecting party of rights conferred by the decree. To the contrary, the cases uniformly hold that the standard applicable to those motions is not a lenient "public interest standard," but whether the proposed modification would, given intervening changes in the facts or the law, serve to "effectuate or to thwart the basic purpose of the original consent decree."[15] In the AT&T Decree, the parties codified that "basic purpose" in Section VIII(C). Similarly, petitioners can cite no case that holds that the "public interest" standard applies when a modification is supported

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[14] *See* Pet. 14a ("proposed modifications of the line-of-business restrictions that were unopposed by the other two parties to the decree" are evaluated under the "public interest" standard); *Triennial Review Opinion*, 900 F.2d at 295, 301-07 ("public interest" standard applies to modification sought by BOCs, supported by DOJ, and unopposed by AT&T; but Section VIII(C) standard applies when AT&T opposes modification sought by BOCs and supported by DOJ).

[15] *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942) (applying this test to modification of sunset provision that benefited defendant); *see also Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 760 (1992) (modification appropriate if government shows "a significant change in factual conditions or in law" that is inconsistent with premises of the Decree); *Ford Motor Co.* v. *United States*, 335 U.S. 303, 320-22 (1948) (DOJ failed to show "good cause" to support modification of consent decree); *United States* v. *International Harvester Co.*, 274 U.S. 693, 702-10 (1927) (terms and purpose of consent decree require denial of DOJ modification request); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 509 (1941); *United States* v. *RCA*, 46 F. Supp. 654, 656 (D. Del. 1942) (applying heightened review standard to Justice Department effort to vacate decree provisions that benefit objecting party), *appeal dismissed*, 318 U.S. 796 (1943).

by the government and a restricted party, but opposed by another party that has rights under the decree provision at issue. The few decisions that address the latter issue are in accord with the decision below.[16]

II. BELLSOUTH'S SEPARATION OF POWERS CLAIM WAS NOT RAISED BELOW AND IS MERITLESS.

There is also no basis for the separate petition for certiorari filed by BellSouth (No. 92-879). It does not dispute that the Decree's terms give AT&T a legal and equitable interest in maintaining the restrictions on the RBOCs in accordance with the Decree's terms. However, BellSouth argues that it is a violation of separation of powers—and interferes with the prosecutorial discretion of the "Executive"—to give effect to these provisions of the AT&T Decree, which the Executive itself had here proposed.

The short answer to this separation of powers claim is that it was not raised below[17] and, as BellSouth concedes

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[16] *See Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 507-09 (1941) (where third party was given rights to intervene to enforce the restriction that an antitrust consent decree imposed on original defendant, this Court reversed the District Court for modifying the restriction on joint motion of defendant and government under the public interest standard and held instead that the District Court must, in modifying the decree, "adjust the right which belongs to [the intervenor] with full regard to the public interest *which underlay the original suit*") (emphasis added); Pet. 19a n.14 (discussing *Missouri-Kansas Pipe Line*); *United States* v. *United States Gypsum Co.*, 124 F. Supp. 573, 580-81 (D.D.C. 1954) (three-judge court) (even when Attorney General is representative of "public interest," "where a dissolution decree by specific statement or fair implication therein accords rights to parties thereto, they have a standing, in the main suit, to enforce such rights in a manner consonant with the underlying purposes of the decree"), *aff'd in rel. part, rev'd in part sub nom. United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457 (1957).

[17] BellSouth concedes that "neither BellSouth nor the other BOCs interposed express constitutional objections." BellSouth Pet. 13. Nor did DOJ. The single-sentence footnote that BellSouth cites

(Pet. 15), "the Court of Appeals made no reference to" any such issue in its decision. In any event, the decision below presents no separation of powers issue that warrants review.

Here, too, the only way BellSouth can argue otherwise is by misstating the terms of the Decree and of the D.C. Circuit's decision. Contrary to BellSouth's claim (BellSouth Pet. 20-23), the decision has no effect on the Justice Department's exercise of its prosecutorial discretion to decide whether to bring proceedings to enforce any provision of the Decree or of the antitrust laws. That AT&T has rights to maintain and enforce Decree provisions in accord with their terms does not interfere with the Department's decision whether it will prosecute violations of the Decree. The Department will continue to have every right itself to refuse to enforce this Decree (as the Department in fact declined to do for a number of years).

Indeed, rather than violate separation of powers, the fact that the Executive can negotiate decrees with provisions such as Section VII and Section VIII(C) *enhances* the Executive's prosecutorial ability to settle cases. The reality is that private parties often will not enter into such a dissolution decree unless the parties can be given rights to maintain and enforce its provisions. The decision to give effect to these rights thus gives the Executive greater latitude to negotiate settlements.

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from the Department's Brief below is irrelevant. *See* BellSouth Pet. 14 (citing DOJ C.A. Br. at 22 n.34). That sentence simply makes the same point raised in the dissenting opinion in *Maryland* v. *United States*, 460 U.S. 1001 (1983): that "constitutional questions" could arise if a court applied heightened scrutiny to Executive decisions through "judicial review under the 'public interest' standard." But *that* issue dropped out of this case once the Court of Appeals construed the Decree to apply Section VIII(C)'s legal standard rather than an amorphous "public interest" test. Even if uncabined judicial review presents a constitutional issue under a "public interest" standard, that issue is not presented when a court applies a distinct, judicially manageable legal standard such as that in Section VIII(C).

BellSouth's separation of powers claims are also contrary to this Court's decisions. Dissolution and other decrees in government suits routinely contain decree provisions that create enforceable rights among the private parties,[18] and this Court has held that the existence of private enforcement rights in government decrees could not "be deemed remotely in conflict with the public duties of the Attorney General." *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 504-09 (1941). In turn, these cases uniformly apply a test that is more stringent than the "public interest standard" to modifications proposed by government. *See* pp. 17-18 & nn.15-16, *supra* (and cases cited). By contrast, BellSouth has not cited a single case in support of its theory that these holdings violate separation of powers.[19]

III. IN ANY EVENT, REVIEW IS INAPPROPRIATE BECAUSE OTHER AVENUES OF RELIEF HAVE BEEN IGNORED AND BECAUSE THE DISPUTE HAS LITTLE PRACTICAL SIGNIFICANCE.

Finally, this decision is peculiarly inappropriate for review for two additional reasons.

First, petitioners have come to this Court after having failed to avail themselves of ordinary avenues for correcting the errors they allege. Because Section VII of the Decree provides that the District Court for the District of Columbia retains jurisdiction over Decree matters, all litigation under the Decree is confined to the D.C. Circuit, and the D.C. Circuit has now decided at least nine cases

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[18] *See, e.g., United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457 (1957); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941); *Terminal Railroad Ass'n* v. *United States*, 266 U.S. 17 (1924) (and cases cited).

[19] In this regard, because Section VIII(C) is a judicially manageable standard, the concerns that were expressed when the Decree was entered have no pertinence to its ongoing administration. *Compare Maryland* v. *United States*, 460 U.S. 1001, 1003-1006 (1983) (Rehnquist, J., dissenting).

under the Decree.[20] As petitioners recognize (Pet. 12), the D.C. Circuit functions for the AT&T Decree much as the Federal Circuit functions in patent cases: it ensures the development of nationally uniform law under the AT&T Decree.

The D.C. Circuit's unique role means that a case under the Decree should be brought to this Court, if at all, only after *en banc* review has been sought in the D.C. Circuit. Petitioners concede these points in principle, but claim that *en banc* review is not feasible "[s]ince an unusual number of judges on the D.C. Circuit are recused." Pet. 12. That is simply wrong. There are eleven active judges on the D.C. Circuit, and, to date, eight have participated in appeals under the AT&T Decree.[21] The RBOCs' failure to seek *en banc* review is inexcusable.

Second, events subsequent to the D.C. Circuit's decision establish that the dispute that led to the proposed modification no longer has much if any practical significance for the administration of the Decree. Despite the prior claims that it would be prohibitive to install STPs in more than a handful of LATAs, U S West has now in-

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[20] *See Common Channel Signalling Opinion*, 969 F.2d 1231 (D.C. Cir. 1992); *NYNEX Procurement Opinion*, 907 F.2d 1205 (D.C. Cir. 1990); *Gateway Opinion*, 907 F.2d 160 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991); *Triennial Review Opinion*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990); *Definition of Manufacturing Opinion*, 894 F.2d 1387 (D.C. Cir. 1990); *Conditional Interest Opinion*, 894 F.2d 430 (D.C. Cir. 1990); *FTS Price Discrimination Opinion*, 846 F.2d 1422 (D.C. Cir.), *cert. denied*, 488 U.S. 924 (1988); *Southwestern Bell Paging Opinion*, No. 89-5106 (D.C. Cir. Oct. 17, 1990) (unpub.); *Line of Business Restrictions Opinion*, 797 F.2d 1082 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

[21] *See, e.g.*, Order, *Royalty Appeal*, No. 92-5079 (D.C. Cir. Nov. 5, 1992) (*Wald, Williams, Buckley*); Pet. 3a (*Silberman*, Williams, *Sentelle*); *Southwestern Bell Paging Opinion*, No. 89-5106 (D.C. Cir. Oct. 17, 1990) (Silberman, Williams, *Randolph*); *Triennial Review Opinion*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990) (*Mikva, Edwards*, Silberman).

stalled STPs in 23 of its 26 LATAs, and has secured a transitional waiver to install STPs in the remaining three LATAs by 1996. *See* pp. 11-12, *supra*. The other six RBOCs have not even had to seek transitional waivers. Although these events do not render the controversy moot, they mean that the practical significance of the dispute that gave rise to the blanket waiver request is radically diminished, and near to the vanishing point.

Moreover, even if the issue had practical significance, there is nothing in the decision below that would preclude petitioners from renewing their request for broader relief, provided they simply make the traditional antitrust showing set forth in the Decree that there is "no substantial possibility" that they will abuse their monopolies. The Department of Justice, too, can readily shape the Decree's administration if it provides more than "perfunctory" (Pet. 25a) market analysis to support its policy preferences. Thus, in addition to all the other reasons review is inappropriate, this case has little practical significance.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 25, 1993